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In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 620

THE DELAWARE AND HUDSON COMPANY, *Petitioner*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and CONNECTICUT RAILWAY AND LIGHTING COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Delaware and Hudson Company prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, affirming the decision of the District Court for the District of Connecticut in the instant case.

OPINIONS BELOW

The opinion of the District Court for the District of Connecticut is reported at 128 F. Supp. 550 (A., p. 38a).* The opinion of the Court of Appeals is not yet reported but a copy is appended hereto (Appendix I).

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*References to Petitioner's Appendix below, submitted to this Court with this petition, are herein denominated: A., p. —.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered on November 7, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

The District Court sitting in bankruptcy under Section 77 (for reorganization of a railroad) disallowed the claim of this creditor on the ground that it was not capable of liquidation or of reasonable estimation under Section 57d. of the Bankruptcy Act. After the passage of a consummation order, the Court, pursuant to the plan of reorganization, set aside a fund of common stock. This was done in order to satisfy creditors' claims which should later become liquidated. Thereafter this creditor's claim was liquidated by a judgment of a state court. Does this creditor have a *legal right* to share in the fund, or does the earlier decision on its claim in bankruptcy amount to liquidation of that claim as valueless?

STATUTES INVOLVED

Section 57d. of the Bankruptcy Act, 11 U.S.C., Section 93(d), provides:

> "d. Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however*, That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay

the administration of the estate or any proceeding under this Act."

Section 57d. is made applicable to railroad reorganization by Section 77(1) of the Bankruptcy Act. *Old Colony Bondholders v. New York, N. H. & H. R. Co.*, 161 F. 2d 413, 428 (2d Cir. 1947), cert. denied 331 U.S. 859. This and other pertinent portions of Section 77 of the Act, 11 U.S.C., Section 205, referred to herein, are reprinted in Appendix II.

JURISDICTION BELOW

The District Court had jurisdiction over the proceedings for reorganization of Respondent, The New York, New Haven and Hartford Railroad Company, under Section 77 of the Bankruptcy Act.

STATEMENT

This case arises out of the reorganization under Section 77 of the Bankruptcy Act of the New York, New Haven and Hartford Railroad Company (hereafter called "the Debtor"). Various aspects of those complicated proceedings have been before this Court on previous occasions (see particularly, *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 161 F. 2d 413, cert. denied 331 U.S. 859; *Connecticut Railway & Lighting Co. v. Palmer*, 305 U.S. 493 (REED, J.)). While the present petition involves a narrow issue of bankruptcy law, a brief summary of the background is necessary.

In 1909 the Boston Railroad Holding Company (hereafter called "the Holding Company") was chartered in Massachusetts to hold securities of the Boston and Maine Railroad. The Debtor has always owned all of the Holding Company common stock; it also has always owned all except 28,000 of the 272,939 shares of its preferred stock. The 28,000 shares were sold to the public

by the Debtor prior to the commencement of the Debtor's reorganization under Section 77 of the Bankruptcy Act in 1935. Each stock certificate so sold contained a guaranty by the Debtor (A., p. 4a).

This case involves this guaranty by the Debtor of (1) cumulative dividends on and (2) upon liquidation of the Holding Company, the $100 par value of the 24,150 of these 28,000 shares, which were still in the hands of public owners when the Debtor went into reorganization. Shortly after initiation of the reorganization proceedings the Debtor's trustees defaulted on guaranteed dividend payments, and a claim was timely filed on the guaranty in the reorganization proceedings (Claim No. 82, A., p. 65a). The trustees in their answer (A., p. 68a) opposed all claims on the guaranty on the ground that they were so uncertain and contingent as not to be allowable (Section 57d.). The Protective Committee, which assumed management of this claim, also filed a petition (A., p. 81a) seeking to compel the Debtor's trustees to bring about the liquidation of the Holding Company, so that a valuation of the guaranty of the par value of the preferred shares could be ascertained.

The plan of reorganization for the Debtor, eventually approved, confirmed and consummated, provided for disaffirmance of the guaranty of the Holding Company stock (A., p. 108a). The plan expressly left the holders of the shares to an unsecured claim for breach of the guaranty (A., p. 107a). Petitioner, The Delaware and Hudson Company, purchased 10,000 of these shares for about $670,000 early in 1944. In the same year the reorganization court approved the plan, denied the petition of the Protective Committee seeking to compel the trustees to liquidate the Holding Company, and entered an order as to the claims on the guaranty (Order No. 763, A., p. 80a).

In Order No. 763 and in its Memorandum of Decision on the claim (A., p. 69a) the Court properly treated as separate the

claims (1) on account of the guaranty of accumulated dividends and (2) on account of the guaranty of par value. The Court allowed a payment of $32 a share as to the first, and no question is raised here as to that determination. But the Court "wholly disallowed, denied and dismissed" the claim as to par value because there had been no liquidation of the Holding Company. The Court noted that such liquidation "may and probably never will come to pass." Thus the Court clearly adopted the trustees' position and disallowed the claim under authority given to it by Section 57d. Petitioner did not appeal from this order, since it assumed that the Court in Order No. 763 had not found that its claim was valueless but only that the claim was not presently capable of liquidation. Moreover, since a pool of common stock of the reorganzied Debtor adequate to satisfy petitioner's claim was to be reserved by the plan for unsecured claims liquidated subsequent to a consummation order, petitioner assumed its claim was adequately protected.

Despite the District Court's prophecy about the unlikelihood of liquidation of the Holding Company, the Massachusetts legislature dissolved it in 1946 (A., p. 118a), and after years of litigation in Massachusetts,* liquidation of the Holding Company in the Massachusetts courts was completed in March, 1953. At that time the court determined that each share of preferred stock would be entitled to a distribution of $11.33 in liquidation.

The valuation of the claim for breach of the guaranty of par value thus having been settled at $88.67 per share, ($100 — 11.33), petitioner initiated the present proceeding to secure satisfaction of its then liquidated claim against the pool of common

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*The Massachusetts litigation reached this Court on two occasions. *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.*, 323 Mass. 282, 81 N.E. 2d 553, appeal dismissed 336 U.S. 932; *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.*, 328 Mass. 63, 102 N.E. 2d 67, cert. denied 343 U.S. 920.

stock reserved by the plan for unsecured claims liquidated subsequent to consummation (A., p. 3a). Petitioner contended that it had *a legal right* to such relief under the provisions of the consummated plan regarding the common stock reserved for unliquidated unsecured claims. In particular Section J(17) of the Plan provided:

> "The common stock available for distribution to the holders of unsecured obligations and claims shall be distributed among them upon the basis of the relationship between the amount of each claim as finally allowed by the court to the total amount of all such claims. The public holders of 24,150 preferred shares of the Boston Railroad Holding Company shall, *to the extent finally allowed by the Court for any breach of the contract of guaranty, both for par value and dividends,* be included among the holders of unsecured obligations and claims." (Italics added.)
>
> "The court shall determine at the time of consummation the amount of common stock necessary to be reserved for the satisfaction of claims not then liquidated and shall reserve the amount so determined for that purpose (any excess so reserved to be sold by the reorganization committee and the proceeds distributed in lieu of stock or scrip to the holders of the new common stock)."

Section K of the Plan provided in pertinent part:

> "The principal debtor's guaranties of the bonds of the New York, Westchester and Boston Railway Company . . . and of the preferred stock of the Boston Railroad Holding Company, shall not be assumed by the reorganized company. No payment shall be made by the reorganized company upon, or on account of, such guaranty of the preferred stock of the Boston Railroad Holding Company, except as provided in clause (17) of section J hereof . . ."

Section XI, 2, (f) and (g) of the Consummation Order (A., p. 131a) reserved jurisdiction of the Court:

> "(f) To consider and act in the matter of the proof of any claim against the Debtor which shall have been filed or for which provision shall have been made in the Plan as of the date of this order but the amount of which shall not have been fixed.
>
> "(g) To consider and act in the matter of the reservation of the shares of Common Stock of the Reorganized Company in so far as necessary to provide for any claim, including the claim of the Secured Sixes for the difference above mentioned, the amount of which has not been fixed as of the date of this order."

Despite the language of these provisions, the District Court has here held that petitioner had no right to the relief sought. The Court states that petitioner's claim was removed by Order No. 763 from the category of unliquidated claims, or claims the amounts of which had not been fixed. In its petition petitioner also claimed that, even if it did not have a legal right to the relief sought, the Court had power under various provisions of the Bankruptcy Act and under Rule 60(b) of the Federal Rules of Civil Procedure to reopen its decree and grant the relief requested. The District Court found it unnecessary to determine its equitable power in this respect for it held, after an extensive review of the facts, that petitioner should not be granted equitable relief.

Upon appeal the Court of Appeals for the Second Circuit affirmed. As to petitioner's claim of a legal right to share in the reserved pool of common stock, the Court held that Order No. 763 took petitioner's claim out of the category of unliquidated or unfixed claims. It pointed to the language in Order No. 763 that the claim on the guaranty of par value was "wholly disallowed, denied and dismissed" and stated that "it is difficult to imagine, any allowance more 'final' than this or any 'liquidation' more explicit." Petitioner submits that the Court below at that

point lost sight of the fact that under the Bankruptcy Act the fact that a claim is "wholly disallowed, denied and dismissed" is not synonymous with the claim being liquidated and valueless. On the contrary, where a claim is disallowed, denied and dismissed under Section 57d., it is by definition unliquidated and of uncertain value. Petitioner will demonstrate that its claim was clearly of the latter variety, and that the courts below thus erred as a matter of law. The bulk of the Court of Appeals' decision deals with petitioner's right to equitable relief, relief as of right having been denied. Petitioner believes that the Courts below incorrectly balanced the equities in this matter, but it recognizes that such issue may not be one of sufficient general importance to warrant this Court's consideration. Therefore, petitioner at this time restricts its prayer for review to the narrow issue of law presented. Thus petitioner submits that it was entitled *as a matter of law* to the relief requested by its petition to the Bankruptcy Court.

REASONS FOR GRANTING THE WRIT

This case presents the important question of the effect in railroad reorganization proceedings under Section 77 of the Bankruptcy Act of the disallowance of a claim because it is not capable of liquidation or reasonable estimation, as is permissible under Section 57d. of the Act. The Courts below, by denying petitioner *the legal right* to participate in a fund reserved for claims liquidated subsequent to consummation of the plan, held in effect that such disallowance is a decision that the claim is valueless, i.e. has been liquidated at zero. Petitioner submits that such reasoning misconstrues the effect of a decision pursuant to Section 57d. in proceedings under Section 77, is contrary to the intent of the Bankruptcy Act, is inconsistent with statements of this Court and lower courts regarding the treatment of creditors in railroad reorganization proceedings, and is contrary to results where Section 57d. is applied in bankruptcy proceedings under

sections of the Act other than Section 77. This important question of federal law has not been, but should be decided by this Court.

It is clear that Order No. 763 disallowed petitioner's claim for breach of the guaranty of the par value of the Holding Company stock because the Court was unable to ascertain the value of petitioner's claim. No effort was made to estimate its value. Thus, in disallowing the claim, the Court proceeded under Section 57d. which it assumed to be applicable in proceedings under Section 77. See Order No. 763 (A., p. 80a) and Memorandum of Decision on Claim No. 82 (A., p. 69a). In particular note (A., p. 77a) that the allowance on the claim for breach of the guaranty of cumulative dividends was made after a determination that Section 57d. did not foreclose allowance of that claim.

The authors of 5 *Collier on Bankruptcy*, 536-7, in considering railroad reorganization proceedings under Section 77 discuss the problem presented by this case. They note that "where claims are not susceptible of liquidation or estimation, or such liquidation or estimation would unduly delay reorganization, a problem arises." They conclude that in order for the plan to satisfy the requirement that it be fair and equitable (Section 77(e)), provision should be made "to pay to holders of such claims, if they become absolute, the value of the securities that would have been allotted to them had the claims been absolute at the time of reorganization." Thus, these eminent authorities on the Bankruptcy Act assert that creditors in petitioner's position are entitled to relief.

In ordinary bankruptcy when a claim is denied pursuant to Section 57d., no problem arises because of the application of Section 63d. which provides that any contingent or unliquidated claim that has been proved but not allowed shall be deemed not provable under the Act and thus not dischargeable. See 3 *Collier*, 195 et seq., 1916. It has never been suggested in such proceed-

ings that a disallowance not on the merits but under Section 57d. amounted to a liquidation at zero. A different result should not be reached in a Section 77 proceeding, and in so holding the courts below have applied Section 57d. in an inconsistent manner.

Section 63d. is not applicable in railroad reorganization proceedings since such proceedings are designed for rehabilitation rather than liquidation. (See Sections 77(b) and 77(f)). Still, consistency with the results in ordinary bankruptcy proceedings and the clear intent of Congress in enacting Section 57d. require a holding that provision must be made in reorganization plans for claims not capable of immediate liquidation. We surmise that this Court may have denied review in *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 161 F. 2d 413, cert. denied 331 U.S. 859, because the lower courts had there held Debtor's reorganization plan to have made adequate provision (the reservation of shares of common stock) for claims that were not capable of liquidation at the time of consummation. We claim there is implicit in this *Old Colony* decision the provision of a substitute in Section 77 proceedings for the survival of unliquidated claims after discharge in ordinary bankruptcy. This substitute (a *legal right* to allowance when a claim becomes liquidated) has here been denied by the Courts below. Petitioner should have been awarded its legal right to a share of the securities set aside for the owners of unliquidated claims.

This Court has upheld the power of the agencies entrusted with railroad reorganization proceedings to eliminate valueless claims from participation in such proceedings. *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 475 (REED, J.); *R.F.C.* v. *Denver & R.G.W.R. Co.*, 328 U.S. 495, 509 (DOUGLAS, J.). We infer from such decisions that a claim not valueless has *a legal right* to participate in the reorganization proceedings. Where, as here, the liquidated value of a claim is not ascertained until after

consummation of the plan, participation may have to be limited to sharing in funds or securities held for the purpose. In depriving petitioner of this legal right to participate, the Courts below have acted inconsistently with the basis of those decisions.

Railroad reorganization under Section 77 is a matter in which broad power is granted to the federal courts. Conflicts of decision seldom arise. Yet the nature of the proceedings requires close scrutiny by this Court. And when a lower court has reached a result contrary to basic concepts of equitable reorganization, review by this Court is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 31, 1955.

APPENDIX I

[Caption omitted in printing.]

Before:

CLARK, *Chief Judge,* and

MEDINA and LUMBARD, *Circuit Judges.*

Appeal from the United States District Court for the District of Connecticut, Carroll C. Hincks, *Judge.*

The Delaware and Hudson Company appeals from the denial, D. C. Conn., 128 F. Supp. 550, of its petition to reopen an order in the proceedings for the reorganization of the New York, New Haven and Hartford Railroad Company which had disallowed the claim of owners of preferred stock of the Boston Railroad Holding Company based on a guaranty of par value and dividends thereof by the New Haven. Affirmed.

FREDERICK H. WIGGIN, New Haven, Conn. (Wiggin & Dana and John W. Barnett, New Haven, Conn., on the brief), *for petitioner-appellant.*

J. H. GARDNER, JR., New Haven, Conn., *for respondent-appellee The New York, New Haven and Hartford Railroad Co.*

EDWARD K. HANLON, New York City (Beekman & Bogue and A. T. Wenzell, New York City, on the brief), *for respondent-appellee Connecticut Railway and Lighting Co.*

CLARK, *Chief Judge:*

The Delaware and Hudson Company appeals from an order in the reorganization proceedings of The New York, New Haven and Hartford Railroad Company which dismissed its petition for reopening of Order 763, entered on Claim 82 in the reorganization proceedings on August 4, 1944. Although the Consummation Order and Final Decree in the proceedings was entered on September 11, 1947, the present petition was not filed until May 11, 1953, or nearly six years later. The original Claim 82 was based upon the New Haven guaranty of the par value and

accrued dividends of the preferred stock of the Boston Railroad Holding Company. Now Delaware, as presently an owner of certain of these shares and relying on a variety of reasons for its delayed action, seeks a reopening of the proceedings to obtain a greater allowance for its benefit than has heretofore been accorded this interest. Although the complex facts and the several arguments deduced therefrom have been presented with skill and adroitness, we are constrained to conclude, as Judge Hincks convincingly demonstrates in his reasoned opinion, D. C. Conn., 128 F. Supp. 550, that Delaware's position is fundamentally untenable.

The Boston Railroad Holding Company was a corporation specially chartered in 1909 by the Commonwealth of Massachusetts to hold the securities of the Boston and Maine Railroad, and all its common stock has always been owned by the New Haven. In 1910 the charter of the Holding Company was amended (Acts and Resolves of Mass. 1910, c. 639) to permit the issuance of preferred stock having a par value of $100 per share. In provisions set forth at 128 F. Supp. 552, 553, this amendatory Act prescribed a preference on liquidation for the preferred stock up to its par value, plus accrued dividends, and further prescribed payment of semiannual cumulative dividends, with the stock and its accrued dividends a charge and lien upon the Boston and Maine Railroad stock held by the Holding Company; it then provided means by which a majority of preferred stockholders could, in case of default in payment of dividends, apply to the Supreme Court of Massachusetts for an order of sale of the Boston and Maine stock to enforce the lien of the preferred stock thereon. Its §5 also authorized a railroad corporation owning any of the common stock of the Holding Company to hold the preferred and to guarantee payment on the preferred of dividends and of par value on liquidation. Pursuant to this section the Holding Company issued 272,939 of its preferred shares to the New Haven; and in 1911, the New Haven sold 28,000 of these shares to the public. On all the stock certificates for this stock appears the New Haven's guaranty of

cumulative dividends and the $100 par value upon which this claim is based.[1] When the New Haven went into reorganization in 1935, 24,150 of these shares were still in the hands of public owners. Of the remaining preferred shares, the New Haven held 247,759, and 1,030 were in the treasury of the Holding Company.

After the start of the reorganization proceedings in 1935, the New Haven trustees pursuant to court order made four regular guaranteed semiannual preferred stock dividend payments. They defaulted, however, on all preferred dividends which became due after July 10, 1937.

On March 30, 1936, the president of the Holding Company, acting on behalf of those holding its guaranteed preferred stock, filed an unsecured claim (Claim 82) for the dividend due on January 10, 1936, and for further dividends that would thereafter become due. The management of this claim was then assumed by a Protective Committee for the preferred stockholders which

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[1] "For value received, The New York, New Haven and Hartford Railroad Company, a corporation established and acting under the laws respectively of Connecticut, Massachusetts and Rhode Island, hereby guarantees the payment of cumulative dividends on the shares of stock represented by this certificate at the rate of four per centum (4%) per annum as stipulated in this certificate, and the payment of one hundred dollars ($100.) upon each share of said stock in case of liquidation or distribution of Boston Railroad Holding Company, and of any deficiency resulting from a sale under the provisions of Section 4 of Chapter 639 of the Acts of Massachusetts of the year 1910."

The certificates also contain the following legend as required by the antitrust decree cited:

"The shares represented by the within certificate are entitled to preference in liquidation according to the terms of the decree entered by the District Court of the United States for the Southern District of New York on October 17th, 1914, as modified by the decree of said Court entered on the 4th day of June, 1923, in the case of the *United States of America* v. *The New York, New Haven and Hartford Railroad Company and others.*"

by sanction of the Interstate Commerce Commission given on August 13, 1936, became the representative of 19,577 shares of publicly held preferred stock. The Protective Committee on April 3, 1941, also filed its Petition for Order 570 seeking to compel action by the New Haven trustees to bring about a liquidation of the Holding Company, which was the contingency upon which the guaranty of par value depended. On April 10, 1941, the New Haven trustees duly answered this Petition and the original claim, asserting that all claims in behalf of the preferred stock were so uncertain and contingent as not to be allowable.

Meanwhile the Interstate Commerce Commission (by Division 4) had submitted its Report and Order of March 22, 1940, on the New Haven Plan, 239 I. C. C. 337, in which it concluded that the preferred stock guaranty should be disaffirmed. The Commission adhered to this conclusion through all Supplemental Reports and Orders, and the disaffirmance was part of the Plan as finally approved, confirmed, and consummated.

On March 6, 1944, the Plan of Reorganization was approved; and on that same date the reorganization court denied the Petition for Order 570 (seeking a liquidation of the Holding Company) on the ground that such liquidation was not to the advantage of the New Haven estate (the holder of the majority of the preferred).

On July 28, 1944, the reorganization court decided Claim 82, which was treated as one for an allowance (1) on account of a breach of the guaranty of $100 (par value) on the preferred stock by reason of the disaffirmance of the guaranty under the Plan, and (2) on account of a breach of the guaranty of the stipulated dividends on the preferred stock. While allowing a payment of $32 per share (payable in common stock of the reorganized New Haven) for breach of the dividend payment guaranty (an allowance not disputed here), the court disallowed in full the claim based on disaffirmance of the guaranty of par value on liquidation. Order 763 entered on August 4, 1944, described this latter branch of the claim as "wholy disallowed, denied and dis-

missed." The reason given by the court for this denial was that, under the Massachusetts Acts incorporating the Holding Company, only the New Haven trustees, as owners of the majority of the preferred stock, had power to institute liquidation proceedings. See *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591, 54 N. E. 2d 183. Since the contingency of the trustees' so acting might not, and probably would not, come to pass, the court held that no loss had been proved on account of the breach of the par value guaranty. No appeal was ever taken from either Order 570 or Order 763.

Meanwhile, between January 27 and March 8, 1944, Delaware purchased 10,000 shares of the publicly held preferred stock of the Holding Company, most of which had been previously represented by the Protective Committee of the preferred stockholders. The last of Delaware's purchases was made only two days after entry of the Memorandum of Decision directing denial of Petition for Order 570 and almost five months before entry of Order 763, which adjudicated Claim 82. The stock purchased by Delaware never was transferred on the Holding Company's transfer books, but remained in the name of Delaware's brokers. Delaware never filed an appearance or participated in its own right and name in the reorganization proceedings until the filing of the present petition; nor, so far as appears, did it ever indicate that it disassociated itself from the prosecution of Claim 82 or the management of Petition for Order 570 by the Protective Committee for the publicly held preferred stock. When Delaware purchased the preferred shares it knew the New Haven was "in bankruptcy" and its attorneys carefully investigated the status of the Holding Company stock.

In 1945, Delaware supported legislation in the Massachusetts General Court to obtain dissolution of the Holding Company by legislative fiat; but that year the attempt failed. In 1946, however, the Massachusetts Legislature by its Chapter 518 of Acts of 1946 annulled the corporate existence of the Holding Company and provided for its receivership and liquidation. On July 3, 1947, at the earliest permissible date, Delaware joined with other

preferred shareholders in a petition to a Massachusetts court for the receivership and liquidation of the Holding Company. So when the Final Decree and Order of Consummation in the New Haven reorganization proceedings was entered two months thereafter, Delaware, despite energetic activities on other fronts, had taken no part whatsoever in those proceedings.

In 1949, after the constitutionality of the Massachusetts Dissolution Act was upheld, *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.*, 323 Mass. 282, 81 N. E. 2d 553, appeal dismissed 336 U. S. 932, the liquidation of the Holding Company proceeded. Upon liquidation Delaware's contention that the lien of the publicly held preferred stock upon the Holding Company assets was prior to that of the preferred stock held by the New Haven estate was overruled, and the Massachusetts liquidation court allowed only $11.32 per share on this stock. See *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.*, 328 Mass. 63, 102 N. E. 2d 67, certiorari denied 343 U. S. 920. Notice of this allowance was sent to preferred stockholders on March 6, 1953. The present petition then followed. It sought for Delaware the difference between the $100 par value of the preferred stock and the $11.32 recovered in the Massachusetts liquidation proceedings—notwithstanding the Final Decree in the reorganization and its long delay both from that and from the earlier disallowance of the claim by the reorganization court.

The demand of Delaware for a reopening is based upon the arguments that (1) Judge Hincks disallowed the claim based on par value at liquidation because he failed to consider the then apparently remote possibility of liquidation of the Holding Company by legislation, and (2) Delaware, now having secured such liquidation and the value of its claim now being capable of exact determination, should have its day in court. But these arguments do not square with what happened or indeed its own behavior throughout.

Delaware contends initially that jurisdiction over the claim of the public holders of preferred stock was expressly reserved to

the reorganization court. It also asserts that the branch of Claim 82 relating to guaranty of par value was disallowed in full by the district court for the reason that the claim was not capable of liquidation; therefore this branch of Claim 82 continued to survive as an unliquidated claim. This contention rests upon §§J(17) and K of the final New Haven Plan (quoted at 128 F. Supp. 556), which provided first for payment in new common stock of the New Haven of any claims allowed for breach of the contract of guaranty of Holding Company preferred stock "to the extent finally allowed by the Court," and second for no other payment or assumption of the guaranty by the reorganized company. And there was a further provision requiring the court at the time of consummation of the Plan to determine the amount of common stock necessary to be reserved "for the satisfaction of claims not then liquidated" and to reserve the amount so determined for that purpose.

Hence it is argued that jurisdiction over the "unliquidated" branch of Claim 82 survived the consummation of the Plan and must now be satisfied from the common stock thus reserved for the purpose. This theory, however, runs afoul of the clear language of both the Plan and the Orders and Opinions of the district court. The "Plan" was approved by the reorganization court on March 6, 1944, and the provision of §J(17) as of that date looks to a future determination of the amount of the guaranty claim by the court. Such a determination took place on August 4, 1944, when the claim was allowed in the amount of $32 for defaulted dividends, and was "wholly disallowed, denied and dismissed" as to any further amount. It is difficult to imagine any allowance more "final" than this or any "liquidation" more explicit. Order 763 by the very force of its language clearly took Claim 82 out of the category of unliquidated claims contemplated by the provision as to them. Moreover, there is evidence that this provision was added in the Fifth Supplemental Report to provide for three categories of claimants: (1) the "Secured Sixes," (2) the Boston Terminal Company trustee, and (3) the Boston and Providence Railroad Company. There is nothing to

suggest that this paragraph was intended to cover claims upon Holding Company preferred stock.

Delaware also attempts to rest jurisdiction upon two provisions of the Final Decree, quoted at 128 F. Supp. 556, 557, from Section XI, 2, giving the court authority to act (f) on any claim filed or provided for in the Plan, but unfixed as to amount, and (g) as to the reserved shares of "Common Stock of the Reorganized Company in so far as necessary to provide for any claim, including the claim of the Secured Sixes" likewise remaining unfixed as to amount. These sections, as it appears from the record, were included in the Decree to accommodate the claims of the "Secured Sixes," the Boston Terminal Company trustee, and the Boston and Providence Railroad Company—all of which were not expected to be "fixed" or "liquidated" until after consummation. Though Delaware vigorously argues that these reservatons of jurisdiction may also be used to cover Claim 82, its contention is of course rooted in its basic premise that the Claim was never "fixed" or "liquidated" before consummation. Since we have found this premise wholly erroneous, Delaware's present argument must fail. Only by a tortured construction of otherwise plain language could we conclude that Delaware's claim is within the court's express reservation of jurisdiction. Such a reservation should not be construed overbroadly. *Towers Hotel Corp.* v. *Lafayette Nat. Bank of Brooklyn in N. Y.*, 2 Cir., 148 F. 2d 145; *North American Car Corp.* v. *Peerless Weighing & Vending Machine Corp.*, 2 Cir., 143 F. 2d 938. Thus we are quite convinced that there was no reservation of jurisdiction over Delaware's claim. Had we been more doubtful, we should still have given weight to the persuasive opinion of Judge Hincks, who was thoroughly familiar with the Plan of Reorganization. *Commission of Dept. of Public Utilities of Com. of Mass.* v. *New York, N. H. & H. R. Co.*, 2 Cir., 178 F. 2d 559, 563, 564, certiorari denied 339 U. S. 943.

Delaware also asserts that the district court had power to reopen its Final Decree under §§2a(8) or 2a(2) of the Bankruptcy Act, 11 U. S. C. §§11(a)(8) or 11(a)(2), or under

F. R. C. P., rule 60(b). Judge Hincks in dealing with this question has concluded that, whether or not these provisions apply to railroad reorganization proceedings, they add nothing to the power of the Court of Bankruptcy in exercising the powers of a court of equity to reopen and revise its own decrees. He found that these equity powers extended to §77 proceedings by virtue of §77(a), which provides that the reorganization court "may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose." He reached this conclusion despite the tenor of finality in §77(f) and the wording of § XI, 3, of the Final Decree, which, except for the express reservations of jurisdiction stated in the Decree, "wholly terminated" and "closed" the proceedings.

We do not here decide whether the power to reopen a final decree in railroad reorganization proceedings, if existing, is to be derived from the inherent equity powers of the reorganization court or from §2a(8) of the Bankruptcy Act or from F. R. 60(b). See *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144; *In re Lowerree*, 2 Cir., 157 F. 2d 831; *Grand Union Equipment Co.* v. *Lippner*, 2 Cir., 167 F. 2d 958, 961; *New York, N. H. & H. R. Co.*, v. *RFC*, 2 Cir., 180 F. 2d 241. But from whatever source derived, it may be exercised only if the equitable standing of the applicant for such relief justifies a reopening. See *Grand Union Equipment Co.* v. *Lippner, supra*, 2 Cir., 167 F. 2d 958, 961. In this case the equities are so strongly adverse to Delaware that the district judge clearly abused no discretion vested in him when he refused to act.

The district court found that Delaware at least as early as January, 1945, was considering the possibility of seeking liquidation of the Holding Company by legislation; and this may have been Delaware's goal as early as May, 1944, when (as it reported in its 1944 Annual Report) it publicly promised to "take steps

to secure the distribution of Boston and Maine stock held by the Holding Company." The Dissolution Act was passed with Delaware's active support in 1946; and on July 3, 1947, a petition was filed in a Massachusetts court seeking liquidation of the Holding Company. All these events transpired before the Final Decree of September 11, 1947. Delaware has offered no satisfactory explanation why it deliberately ignored the reorganization proceedings while it sought dissolution in Massachusetts. Judge Hincks adjudicated Claim 82 without considering the possibility of a legislative dissolution of the Holding Company—an entirely reasonable course of action under the facts available to him. Had Delaware taken the obvious step of bringing to the attention of the court its maneuvers in Massachusetts, the court might have valued the contingency differently or might have postponed adjudication of the par value claim and reserved jurisdiction to determine it after the Final Decree. The policy of finality in reorganization decrees may not be ignored in order to reward such unjustifiable tardiness. See *Towers Hotel Corp.* v. *Lafayette Nat. Bank of Brooklyn in N. Y., supra*, 2 Cir., 148 F. 2d 145, 148.

Delaware asserts that its delay here was justified because the Claim for par value, being unliquidated, was preserved by §J(17) of the Plan, and that no effective action in the reorganization court could be taken until the Claim was finally liquidated by action in Massachusetts. Since, as we have shown, Claim 82 was not unliquidated, the argument fails. We find it difficult to conceive of reasonable reliance on the preservation of a claim as "unliquidated" when that claim has been "wholly . . . denied and dismissed."

Although in general a plan may not destroy a contingent claim without providing for it in some manner—see *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 2 Cir., 161 F. 2d 413, 428, certiorari denied *Institutional Group for Boston Terminal Bonds* v. *New York, N. H. & H. R. Co.*, 331 U. S. 859—we conclude that here, where a claimant has deliberately refrained

from disclosing to the court before consummation the possibility of liquidation by legislation, it cannot now be heard to assert that the Plan must be interpreted to provide for its "unliquidated" claim.

Though Judge Hincks found Delaware's unexcused delay sufficient in itself to justify dismissal of the petition, he went on to hold the petition barred because of the intervening rights of holders of "Certificates of Interest," which vested on the basis of the Final Decree. These certificates entitled unsecured creditors to share pro rata in the common stock of the reorganized New Haven which remained after satisfaction of the claims unliquidated at consummation of the Plan. To allow Delaware any satisfaction of its claim would impair the rights of Certificate Holders by a like amount. There have been active dealings in the Certificates since their issuance. We agree with Judge Hincks that the intervention of vested rights furnishes an additional reason for refusing to reopen the proceedings. See *In re Peyton Realty Co.*, 3 Cir., 148 F. 2d 771.

AFFIRMED.

APPENDIX II

Section 77, Bankruptcy Act of 1938 as Amended

(b) . . . The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. . . .

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, credi-

tors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same. . . .

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan

and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. . . .

(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 620

THE DELAWARE AND HUDSON COMPANY,
Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and CONNECTICUT RAILWAY AND LIGHTING COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals is reported at 227 F. 2d. 291 (Pet. App. 12).[1] The opinion of the District Court (A. p. 38a) is reported at 128 F. Supp. 550.

Jurisdiction

The judgment of the Court of Appeals was entered on November 7, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

[1] References to the petition will be indicated by "Pet. ....." References to the petitioner's Appendix filed in the Court of Appeals will be indicated by "A. ....." References to the Appendix annexed to the petition will be indicated by "Pet. App. ....."

Question Presented

The Petitioner (herein called "Delaware") propounds a question which is not "expressed in the terms and circumstances of the case" (Rule 23(1)(c) of the Revised Rules of the Supreme Court). Delaware incorrectly states that its claim was disallowed on the ground that it was not capable of liquidation or of reasonable estimation as defined by Section 57d of the Bankruptcy Act (11 U. S. C. Section 93(d)) (Pet. 2). Actually, Delaware's claim was disallowed because the reorganization court found it to be valueless. The question presented, properly stated, is whether a creditor whose claim has been disallowed as valueless may share in a fund of common stock reserved by the reorganization court to satisfy claims which had not been liquidated at the date of the entry of the Final Decree and Consummation Order.

Statutes Involved

The statutes involved are set forth, in pertinent part, in the petition (Pet. 2, Pet. App. 23-25).

Statement

(A) The Facts Concerning the New Haven Reorganization:

The Boston Railroad Holding Company (herein called "Boston") was chartered in 1909 by the Commonwealth of Massachusetts. All of its common stock was then and thereafter owned by The New York, New Haven and Hartford Railroad Company (herein called "New Haven") (A. 39a).

In 1910, following an amendment to its charter, Boston issued a large block of $100 par value preferred stock

which New Haven acquired. The preferred stock provided for cumulative dividends, payable semi-annually, and a preference, upon dissolution or liquidation of Boston, "to payment of the par value thereof and accrued dividends" (A. 39a-40a).

In 1911, New Haven sold 28,000 shares of Boston's preferred stock to the public. New Haven guaranteed payment of the cumulative dividends and the sum of $100, upon each share of the publicly held preferred stock "in case of liquidation or distribution" of Boston (Pet. App. 13-14).

In 1935, New Haven filed a petition for reorganization under Section 77 of the Bankruptcy Act. At that time, 24,150 shares of Boston's preferred were held by the public (Pet. App. 14).

On March 30, 1936, the President of Boston filed unsecured Claim 82 for dividends due on Boston's preferred from January 10, 1936 and thereafter and for the par value of said preferred stock (A. 65a-67a). Subsequently, a Protective Committee for preferred stockholders (herein called the "Protective Committee"), with the approval of the Interstate Commerce Commission, became the representative of the then publicly held shares of preferred.

On March 22, 1940, Division 4 of the Interstate Commerce Commission recommended disaffirmance of the guaranty[2] (Pet. App. 15).

On April 3, 1941, the Protective Committee filed a petition for Order 570 to compel New Haven trustees to liquidate Boston and thereby make effective the guarantee of the par value of the Boston preferred. This petition was denied on March 6, 1944 in the court's Memorandum of Decision (A. 92a-103a). No appeal was taken from this order.

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[2] 239 I. C. C. 337, modified by the Commission in 244 I. C. C. 239.

On March 6, 1944, the reorganization court approved the Plan of Reorganization.[3]

In the meantime, Claim 82 was still pending before the reorganization court. The court proceeded to treat this claim as one for an allowance (a) on account of a breach of guaranty of the cumulative dividends on Boston preferred and (b) on account of the breach of guaranty of the $100 par value, which allegedly arose out of the disaffirmance of the guaranty in the Plan of Reorganization (A. 43a, 69a-80a).

On July 28, 1944, the reorganization court filed its Memorandum of Decision wherein it allowed a payment of $32 per share for the breach of the guarantee of dividend payments (A. 79a). Insofar as Claim 82 sought an allowance on account of the breach of the guarantee of the $100 on the preferred stock, the court said that "no loss has been proved on account of the breach of this branch of the guarantee" (A. 76a). Thereafter, on August 4, 1944, Order 763 was entered. This decreed that the claim for the breach of guarantee of the par value of the preferred stock ($100) was "wholly disallowed, denied and dismissed" (A. 80a). No appeal was ever taken from this order.

On September 11, 1947, the Court entered its Consummation Order and Final Decree (A. 125a-134a) which provided for closure of the estate and consummation of the plan under Section 77(f) (Pet. App. 24, 25). At that time the amount of the various unsecured claims (including Claim 82) entitled to participate in the reorganization had been determined by the Court in one way or another. Only

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[3] On February 8, 1944, the Commission, by its Fifth Supplemental Report and Order (257 I. C. C. 9) issued its final plan which retained the provisions in earlier plans (1) that the public preferred shareholders of Boston should be included among the holders of unsecured obligations and claims, both for par value and dividends, "to the extent finally allowed by the court for any breach of the contract of guaranty" (Sec. J(17)), and (2) that the guaranty should not be assumed (Sec. K) (A. 107a-108a).

the three large claims were not then liquidated, namely, the claims of "Secured Sixes", the Boston Terminal Trustee and Boston and Providence Railroad [4] (A. 59a-60a).

On December 11, 1947, by its Order No. 1015, the Court formally determined that the amount of allowed claims entitled to participate in the distribution of the new common stock of the reorganized company (including the amount allowed for unpaid dividends on Claim 82 under Order No. 763) aggregated $46,916,727.01 (A. 142a).

On April 5, 1948, the Court issued Order 1016 in which it reserved $60,466,872.99 par value of new common stock for the three unliquidated claims and simultaneously directed the initial distribution of the remaining $46,916,727.01 in par value of the new common stock for all other claims (A. 145a).

Finally, under Order 1028, entered on May 19, 1948, unsecured creditors whose claims were approved prior to the consummation order received, in addition to the initial distribution of new common stock, Certificates of Interest representing pro rata shares in so much of the reserve fund of common shares as exceeded the amount thereof necessary to discharge the three claims which were to be liquidated after the consummation order was entered (A. 60a-61a, 146a-153a). This order also directed the cancellation of the guarantee of the Boston preferred stock (A. 151a).

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[4] In addition to the three claims certain other unfinished business remained to be disposed of, viz., allowances for compensation, final accounting by the Trustees, the acquisition of the Boston and Providence property then in reorganization in a different court and certain other matters which will appear from the reservations of jurisdiction in the order at A. 131a-133a.

(B) The Facts Concerning Delaware's Activities:

Throughout all of the proceedings in the reorganization court and for almost six years after the entry of the Final Decree and Consummation Order, Delaware remained a silent bystander notwithstanding notice and sufficient opportunity to participate. That it has neither a legal nor equitable right to relief is disclosed by a brief history of its conduct.

Between January 27 and March 8, 1944, Delaware acquired 10,000 shares of preferred stock of Boston. Its last purchase of Boston preferred stock was made two days after the entry of the Memorandum of Decision directing denial of the Petition for Order 570 and approximately six months before Order 763 was entered (Pet. App. 16).

For almost nine years, after it first purchased the stock, it took no action whatever in the reorganization proceedings. Almost six years elapsed between the date of entry of the Final Decree and Order of Consummation and May 8, 1953 when it filed a petition in the United States District Court for the District of Connecticut to reopen Order 763 (A. 3a-17a).

Delaware sought relief, not in the reorganization court, but before the Massachusetts Legislature and the Massachusetts courts. As early as May 15, 1944, it publicly announced a plan to secure a liquidation of Boston (A. 53a). It participated in activities which, on June 11, 1946, resulted in the enactment of a law by the Massachusetts Legislature that directed a dissolution of Boston (A. 118a-121a), and joined in proceedings which led to the appointment of a receiver, for Boston, by the Massachusetts court (A. 54a).

It is noteworthy that the Act of 1946 was approved more than a year before the entry of the Final Decree and Order of Consummation and that the proceedings in the Massachusetts Court for the appointment of a receiver were instituted approximately two months before the Final Decree was entered (A. 54a, 125a-134a). At no time, however,

did Delaware participate in the reorganization proceedings or apprise the reorganization court of its activities and interest in the Boston preferred or in the Claim on the guaranty. It was only after the Massachusetts liquidation court directed an allowance of $11.33 per share on Boston preferred that Delaware invoked the aid of the reorganization court.

In its petition to reopen Order 763 filed on May 8, 1953 in the District Court, Delaware sought to recover $88.67 for each share of preferred, representing the difference between the par value of $100 and the $11.33 received through liquidation. Upon analysis of the facts, the reorganization court found:

> "Thus the subject-matter, upon which the present petition is predicated, is clearly shown to have been in the Petitioner's mind, and yet not presented to the reorganization court, for at least two years and eight months before entry of the Final Decree and Consummation Order in these proceedings" (A. 54a-55a).

Argument

Delaware's case is predicated upon an incorrect assumption that Order 763 disallowed Claim 82, because it was not capable of liquidation or of reasonable estimation under Section 57d of the Bankruptcy Act (Pet. 2). Delaware's contention that it has a "legal right" to share in the fund of common stock created by the reorganization court for claims liquidated after the Consummation Order and Final Decree was entered is without merit. Delaware's reliance upon the provisions of Sections J(17) and K of the Plan of Reorganization and upon Sections XI, 2, (f) and (g) of the Consummation Order is misplaced (Pet. 6-7).

Contrary to Delaware's contentions (Pet. 8-9) there is no conflict of decisions between Courts of Appeals which need to be resolved and there is no conflict between the deci-

sions of the two courts below and statements of the Supreme Court. Indeed, Delaware cites no authority to support its assertion. Of Delaware's argument it may be said:

> "Much of petitioner's argument seems to depart from these assumptions [the findings of the District Court] and to invite us to reach conclusions from the voluminous record in this case, contrary to those reached by the two courts below. This we cannot do. A seasoned and wise rule of the court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors, etc., et al.*, 335 U. S. 211, 213-214.

It is respectfully submitted that the decision of the court below may be sustained, without reaching the question raised by the petition, upon the grounds that a balancing of the equities in this case alone forecloses Delaware from the relief sought. *Vanston Bondholders Protective Committee* v. *Green, etc.*, 329 U. S. 156, 165.

Moreover, this case turns upon its own facts. If there is a question, apart from the consideration of equities, it is one of interpreting the reorganization court's Memorandum of Decision filed on Claim 82 and its Order 763.

1. Delaware's basic contention is that Order 763 disallowed Claim 82 on the ground that it was not capable of liquidation or reasonable estimation under Section 57d of the Bankruptcy Act.

This is a palpable misconstruction of Order 763. Although the reorganization court considered Claim 82 as one within the contemplation of Section 57d it was "wholly disallowed, denied and dismissed" because "no loss has been proved on account of the breach" of the guarantee of the par value of the preferred (A. 76a). This statement by the reorganization court makes clear that the claim of Delaware was disallowed, not because it was incapable of liquidation or reasonable estimation, but because it was valueless. When the Court determined the validity and value of the claim, it properly exercised the function vested

in it by Congress. *Brown* v. *Gerdes*, 321 U. S. 178; *Pepper* v. *Litton*, 308 U. S. 295.

Clearly, the reorganization court has the power under Section 77(e) (11 U. S. C. 205(e)) to eliminate claims which it determines to be valueless.[5] *Connecticut Railway & Lighting Company* v. *Palmer*, 305 U. S. 493, 505.

The construction of Order 763, namely, that the claim on account of the breach of guaranty of par value was valueless, was consistently accorded to the Memorandum of Decision and to Order 763 by the reorganization court and affirmed by the Court of Appeals on appeal. It is fundamental that the construction of a plan of reorganization by the judge who has superintended the proceedings and has previously dealt with the claim in question is entitled to persuasive weight. *Commission of Department of Public Utilities of Commonwealth of Massachusetts* v. *New York, N. H. & H. R. Co.*, 178 F. (2d) 559 (CA 2), certiorari denied 339 U. S. 943, reh'g den. 339 U. S. 972. This conclusion is re-enforced by the equally basic rule that a reorganization plan which has been "certified by the Interstate Commerce Commission and approved by the court * * * becomes final, is binding upon the debtor, the security holders, and all interested parties and must be enforced as written." *Denver & R. G. W. R. Co.* v. *Goldman Sachs & Co.*, 212 F. 2d 627, 630 (CA 10).

Insofar as Claim 82 sought payment for breach of the guarantee of par value, it was provable within the meaning of Section 63(a) of the Bankruptcy Act (11 U. S. C. § 103(a)) even if it had no legal merit. But it is elementary that a creditor may not share in the assets of a bankrupt or a debtor unless his claim is both provable under one or more of the subdivisions of Section 63(a) of the Act and allowable under Section 57 (11 U. S. C. § 93(a)).

A claim may be disallowed on the merits or because it is barred by a statute of limitations or because it is not ca-

[5] While the factual situation in *Ecker, etc.* v. *Western Pacific Railroad Corporation, etc.*, 318 U. S. 448 is not comparable to the facts in the case at bar, the principles governing the power of the reorganization court to eliminate valueless claims (p. 475 of the opinion) are applicable.

pable of reasonable estimation. In an ordinary bankruptcy proceeding, a valid contingent or unliquidated claim which is not allowed because it is not capable of reasonable estimation or liquidation is deemed not provable under the Act and, under Section 63d of the Act, is not dischargeable in bankruptcy (11 U. S. C. § 103(d)). However, where a provable contingent or unliquidated claim is not allowed, either because it is not valid or because it is barred, Section 63d is inapplicable and the creditor has no claim to the assets of the bankrupt and no claim which may be enforced after the discharge of the bankrupt. *Lesser* v. *Gray*, 236 U. S. 70, 74, 75; *Hargadine-McKittrick Dry Goods Co.* v. *Hudson, et al.*, 122 Fed. 232, 235 (CA 8).

Delaware concedes that Section 63d "is not applicable in railroad reorganizations" (Pet. 10). Delaware suggests, however, that unless it is permitted to share in the fund of common stock reserved for the three claims liquidated subsequent to the consummation of the plan, the Congressional intent underlying Section 57d is frustrated. The short answer to Delaware's claim is that even if Section 63d was applicable to proceedings under Section 77 of the Bankruptcy Act, it could not participate in the fund which has been reserved since claim 82 was disallowed because it was valueless. No rights of any kind remained which Delaware could enforce even if the proceedings involved were in ordinary bankruptcy.

Moreover, if Congress intended that a provable contingent claim, in a reorganization proceeding under Section 77, be accorded the same treatment that applies to valid provable claims which are not allowed and, hence, not discharged in ordinary bankruptcy, then creditors holding such unliquidated claims could proceed directly against the reorganized company. Delaware admits, however, that this is an impossible result in Section 77 reorganizations (Pet. 10) since it would defeat the objective of finality incorporated in Section 77(f) and frustrate the hope of rehabilitation which is the touchstone of Section 77 proceedings.

Delaware fails to recognize that Section 77 does provide the mechanics for treating contingent claims which have not been liquidated before the plan of arrangement has been approved. *Old Colony Bondholders et al.* v. *New York, N. H. & H. R. Co.*, 161 F. (2d) 413 (CA 2), certiorari denied *Institutional Group for Boston Terminal Bonds* v. *New York, N. H. & H. R. Co.*, 331 U. S. 859; *Connecticut Ry. & Lighting Co.* v. *New York, N. H. & H. R. Co.*, 190 F. (2d) 305 (CA 2). Unfortunately, Delaware misconstrues the statements of the authors of Collier on Bankruptcy (Pet. 9). As the authors of Collier on Bankruptcy (5 Collier on Bankruptcy, 536-7) properly point out, provision may be made, as it was in the instance of the three specific unliquidated claims in this case, for the payment of contingent and unliquidated claims after the plan of reorganization has been consummated, by reserving jurisdiction in the reorganization court until such claims are liquidated (A. 133a-134a). This, indeed, is the substitute for, or the correlative of, Section 63d. However, neither Section 63d nor the method contemplated by Section 77 is applicable if there is no valid claim or if the claim is barred or if the claim is held to be valueless, as it was in this case. Where, as in the case at bar, the claim of damage is based upon the disaffirmance of a guaranty and the reorganization court finds that no damage has been shown, it may disallow the claim as valueless. *Connecticut Railway & Lighting Company* v. *Palmer*, 305 U. S. 493, 505.

The reorganization court and the Court of Appeals concluded that there was no claim and, consequently, no legal or equitable right to share in the fund of common stock reserved for unliquidated claims. *Vanston Bondholders Protective Committee* v. *Green, etc.*, 329 U. S. 156, 170.

2. The Memorandum of Decision on Claim 82, by its very terms, disposes of Delaware's contention that its claim was not allowed because it was incapable of liquidation or of reasonable estimation. As the Court of Appeals in this case said, the claim was liquidated before the Final Decree

and Consummation Order was entered (Pet. App. 21). Earlier in its opinion, the Court of Appeals said:

> "Order 763 by the very force of its language clearly took Claim 82 out of the category of unliquidated claims contemplated by the provision as to them" (Pet. App. 18).

Delaware's contention that its "legal right" to share in the fund was preserved by the provisions of Sections J(17) and K of the Plan is conclusively disposed of by the reorganization court's finding. As the reorganization court said, these sections of the plan "were speaking prospectively as of February, 1944" (A. 48a). On August 4, 1944, except as to the claim for dividends, Claim 82 ceased to be an unliquidated claim, as the reorganization court and the Court of Appeals determined (A. 48a; Pet. App. 18).

As for Delaware's claim that the provisions of Section XI, 2, (f) and (g) of the Final Decree and Consummation Order reserved jurisdiction of the Court to allow its claim, the answer of the District Court is, again, dispositive:

> "By the entry of Order 763, Claim 82 was plainly removed from the category of claims provided for by these subparagraphs (f) and (g). This is sufficiently attested by the concise language of these subparagraphs which limited their coverage to claims 'the amount of which shall not have then (September 11, 1947) been fixed' * * * subparagraphs (f) and (g) were included in the Final Decree and Consummation Order only to permit the Court by an appropriate reservation of jurisdiction to provide equal treatment in accordance with the Plan for three large claims not then liquidated. These were the claims of the so-called Secured Sixes, the claim of the Boston Terminal Company trustee and the claim of the Boston and Providence Railroad Company * * *" (A. 49a).

3. Delaware does not urge the equities of its position (Pet. p. 8); it suggests, however, that its "legal rights" are sufficient to sustain its position. Delaware's reluctance

to discuss the equities is understandable since it recognizes its inability to demonstrate that measure of substantial injustice which is required to reopen Order 763 and to impair the intervening rights of other creditors. *Bondholders, Inc.* v. *Powell, et al.*, 190 F. 2d 74, 81 (C. A. 4), certiorari denied 345 U. S. 921. Indeed, if there were any "legal rights" they were rendered unenforceable by the failure to take timely appeals from Order 763 and the Final Decree.

It must be conceded that Delaware did not participate in any of the reorganization proceedings notwithstanding notice thereof. It is equally clear that for almost six years after the plan of reorganization had been approved, Delaware took no action on Order 763 despite the fact that it had notice of all of the proceedings. As far back as May, 1944, Delaware planned to secure a liquidation of Boston. In January, 1945, Delaware participated in proceedings to secure a liquidation of Boston by a statutory enactment. In June, 1946, the Massachusetts Legislature annulled the charter of Boston and provided for its receivership and liquidation. On July 2, 1947, Delaware joined with other preferred shareholders in a petition to the Massachusetts court for receivership and liquidation of Boston. All of this occurred before the Final Decree and Order of Consummation was entered by the reorganization court. Delaware had ample opportunity to apprise the reorganization court that liquidation by legislative fiat was contemplated or to participate in the reorganization proceedings.

Notwithstanding its knowledge of the pendency of liquidation proceedings, it made no effort to disclose its interest to the court as a preferred stockholder and made no attempt, for almost six years, to invoke equitable remedies available to it in the reorganization court and took no appeal from Order 763.

In the meantime, the rights of other creditors had matured. Delaware now seeks to alter and impair these

rights. A balancing of the equities discloses Delaware's untenable position. *Grand Union Equipment Co.* v. *Lippner*, 167 F. (2d) 958 (C. A. 2); *Mohonk Realty* v. *Wise Shoe Stores*, 111 F. 2d 286 (C. A. 2).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
February 23, 1956.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 620

THE DELAWARE AND HUDSON COMPANY,
Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and CONNECTICUT RAILWAY AND LIGHTING COMPANY,
Respondents.

BRIEF OF RESPONDENT, CONNECTICUT RAILWAY AND LIGHTING COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the District Court for the District of Connecticut is reported at 128 F. Supp. 550 (A 38a).* The opinion of the Court of Appeals is reported at 227 F. 2d 291 (App. 12).

Question Presented

The Petitioner (hereinafter referred to as "Delaware") here seeks to review a determination of the Court of

* This and similar references are to the Petitioner's appendix in the Court of Appeals. The appendix to the joint brief for the appellees in the Court of Appeals will be referred to as "J" followed by page references. References to the appendix to the Petition for Certiorari will be referred to as "App." followed by page references.

Appeals for the Second Circuit which unanimously affirmed an order of the United States District Court for the District of Connecticut (Hincks, J) entered in the reorganization proceedings of the respondent, The New York, New Haven and Hartford Railroad Company (hereinafter referred to as "New Haven"). The order of the District Court denied a petition of Delaware for the modification of a previous order which had disallowed, denied and dismissed a claim upon the New Haven's guaranty of par value of the publicly held preferred stock of Boston Railroad Holding Company (the "Holding Company").

This guaranty was contingent upon the liquidation of the Holding Company and a deficiency resulting from the sale of its assets. Under the Holding Company's charter such a liquidation could be brought about only upon the petition of New Haven as holder of a majority of the Holding Company's preferred shares. Two attempts to compel the New Haven Trustees to liquidate the Holding Company having failed during the reorganization proceedings, the District Court "wholly disallowed, denied and dismissed" the claim on the guaranty of par value (A 80a), since that guaranty was to become effective "only upon a contingency which, in so far as the proofs show, may and probably will never come to pass" (A 76a). No appeal or other objection was taken with respect to this determination by Delaware or any other party.

Delaware thereafter avoided any participation in the reorganization proceedings and permitted the Consummation Order and Final Decree to be entered without objection. On the other hand, Delaware, without any disclosure of any kind to the court, sponsored and obtained special legislation in Massachusetts which resulted in the dissolution of the Holding Company. Delaware, having received in the statutory dissolution proceedings far less than it

had anticipated, thereupon, almost six years after the Consummation Order and Final Decree, filed in this proceeding the petition here involved.

Pursuant to the Plan of Reorganization the court had set aside a fund of common stock to satisfy the claims of three specified groups of creditors which could only be liquidated after consummation. At this point the rights of the creditors in question and of other creditors whose claims already had been allowed, including this respondent, Connecticut Railway and Lighting Company, became vested in this fund.

Delaware's petition to this Court *is based exclusively* on "the narrow issue of law" which it asserts is presented by its contention that, "where a claim is disallowed, denied and dismissed under Section 57(d) (of the Bankruptcy Act), it is by definition unliquidated and of uncertain value", that its claim was "clearly of the latter variety" and hence that it was entitled *as a matter of law* to reopen the matter (petition, p. 8).

The question here presented in actuality is as to whether, in the light of all the facts, Delaware now has a legal right to obtain a modification of the order of disallowance of the claim on the guaranty of par value and to share in the fund.

STATEMENT

Introductory

The Holding Company was created by a special act of the Massachusetts legislature for the sole purpose of acquiring and holding securities of The Boston & Maine Railroad (A 3a).

When the New Haven reorganization proceedings started in 1935 (and during the course of the proceedings)

the New Haven held the entire 31,065 shares of common stock of the Holding Company (A 3a) and 247,759 out of the total of 272,939 preferred shares (A 4a-5a). Of the 25,180 preferred shares not held by the New Haven, 1,030 were in the treasury of the Holding Company, and 24,150 (the so-called "publicly held preferred shares") were held by various other persons and corporations (A 5a). These latter bore the New Haven's guaranty of payment of dividends at the rate of 4% per annum and of $100 (par value) in case of liquidation of the Holding Company and any deficiency resulting from a sale of its assets (A 4a). Such liquidation could be brought about under the Holding Company's charter only upon petition of the New Haven as holder of "a majority" of the preferred shares (A 22a Sec. 4).

On March 30, 1936 an unsecured claim (No. 82, A 65a) was filed for breach of the New Haven's guaranty. On August 4, 1944 this claim was allowed at $32 per share with respect to dividends, but as to par value it was "wholly disallowed, denied and dismissed" (Order No. 763, A 80a). No appeal was taken.

Thereafter, on September 11, 1947, after a hearing, the Consummation Order and Final Decree was entered (A 125a). A further period of almost six years elapsed, when, on May 11, 1953, Delaware, as holder of 10,000 of the preferred shares, filed a petition seeking to reopen the proceedings with respect to the disallowance, denial and dismissal of the claim on the guaranty of par value.

Judge Hincks denied the petition, (a) overruling Delaware's contention that the court had expressly reserved jurisdiction to reopen the disallowance at that late stage in the proceedings (A 49a), and (b) further holding that Delaware's intentional failure to participate in the litigation on the claim or to make seasonable appli-

cation for revision of the order of disallowance before that order had "become hardened into the finality of a Final Decree", had deprived Delaware of any equitable standing (A 50a, 56a).

The Court of Appeals, in an opinion by Chief Judge Clark, unanimously affirmed (App. 12-22), with the result that the instant petition for certiorari has been filed in this Court.

Treatment of New Haven's Unsecured Creditors

On February 8, 1944 the Interstate Commerce Commission issued its Fifth Supplemental Report and Order on New Haven's Plan of Reorganization (257 I.C.C. 9), which was the plan that was finally approved, confirmed and consummated. Under this plan the holders of unsecured obligations and claims were to receive new common stock of New Haven, this stock to be distributed among such creditors "upon the basis of the relationship between the amount of each claim as finally allowed by the court to the total amount of all such claims" (A 107a).

On December 11, 1947 the court entered its Order No. 1015 fixing $46,916,727.01 as the amount of the then allowed claims of the unsecured creditors entitled to participate in the distribution of New Haven's common stock (A 141a-142a).

In the interest of procuring an initial distribution, New Haven, on February 25, 1948, filed a petition for the determination of the amount of common stock to be reserved for unliquidated claims (A 143a). The hearing on this petition was devoted to various estimates of the maximum amount of the only three remaining groups of unliquidated claims before the court, i.e. those of the so-called "Secured Sixes", the claims on behalf of the trustee

and bondholders of the Boston Terminal Company, and the claim on the disaffirmance of the lease of the Boston and Providence Railroad Company. After hearing, by its order of April 5, 1948 (A 144a-145a) the court directed that $60,466,872.99 par value of stock should be reserved and the balance of $46,916,727.01 distributed to the holders of the unsecured claims theretofore allowed.

The court's subsequent order of May 19, 1948 (A 146a, 150a-151a, par. 4) provided for so-called certificates of interest (Ex. P-10, A 153a) which were to be issued to creditors for claims already allowed in order to evidence their interest in this reserved balance of stock.

As Judge Hincks explained (A 60a-61a):

> "Thus, these certificates constituted a device to carry into effect the basic provision of the Plan as embodied in the Final Decree and Consummation Order whereby the entire common stock of the reorganized New Haven should be allocated to unsecured creditors, *pro rata*, in proportion to the amounts of their respective claims as finally allowed. This right of participation vested in unsecured creditors upon entry of the Final Decree and Consummation Order."

Judge Hincks further said (A 61a-62a):

> "But by that Order, unsecured creditors who in return for the surrender of their claims received the initial distribution of stock and Certificates of Interest became entitled, *pro rata*, eventually to receive, upon surrender of their Certificates of Interest, the entire remainder of the stock reserved under Order 1016, except so much thereof as might be required for an initial distribution thereof to any of the three claimants for the adjudication of whose claims jurisdiction had been reserved."

Of the three groups of claimants in question, the Secured Sixes were thereafter paid by New Haven and the Boston Terminal Company claims have been liquidated and those creditors have received their distribution of stock and certificates. There remains only the claim of the trustee of the Boston and Providence Railroad Company.

What Delaware seeks to achieve by its attempt to reopen the long disallowed claim upon the guaranty of the Boston Railroad Holding Company preferred stock is participation in the reserved common stock of New Haven, with a resultant dilution of the interests of the holders of the certificates, outstanding for a number of years.

The Decision on the Guaranty

As has been said, on March 30, 1936, shortly after the beginning of the reorganization, an unsecured claim was filed upon the guaranty, which was known as Claim No. 82 (A 65a-67a). Subsequently, the management of the claim was assumed by a Protective Committee for the preferred stockholders, which committee also filed a petition for Order No. 570, seeking to compel action by the New Haven Trustees looking to a liquidation of the Holding Company, "the contingency upon which the guaranty of par value depended" (A 42a).

When it became apparent that the final plan of reorganization would provide for the disaffirmance of the guaranty, Judge Hincks denied the petition for Order No. 570 (see opinion A 92a-103a), and thereafter, by his Memorandum of Decision dated July 28, 1944 (A 69a-79a), allowed the claim of the publicly held preferred stock for breach of the dividend-payment guaranty at $32 per share (A 79a) but denied the claim as to the guaranty of par value (A 76a). In this connection Judge Hincks said that no liquidation of the Holding Company had yet occurred,

that there was no proof that a liquidation or sale would occur in the future, that under the Massachusetts statute a sale of the Holding Company portfolio could be forced only on an application of a majority of the preferred stock and that there was no proof that such majority (the New Haven Trustees) would ever make such an application (A 76a). Judge Hincks thereupon held (A 76a):

> "Since the guarantee of principal is stated to become effective only upon a contingency which, in so far as the proofs show, may and probably will never come to pass, I must hold that no loss has been proved on account of the breach of this branch of the guarantee."

Order No. 763, entered upon the decision, after allowing the claim upon the guaranty of dividends, provided (A 80a):

> "(2) That any and all other claims against the estate of the Principal Debtor herein on behalf of the preferred stock of Boston Railroad Holding Company be and they hereby are *wholly disallowed, denied and dismissed.*" (Italics supplied.)

This order was entered on August 4, 1944. No appeal from it was taken by any interested party, nor was any attempt ever made to modify it until the instant petition of Delaware (A 3a-17a) dated May 8, 1953, almost nine years later.

Lack of Equity in Delaware's Conduct

On January 27, 1944, a few days before the Commission issued its Fifth Supplemental Report and Order and while Petition for Order No. 570 and Claim No. 82 were still pending and undecided, Delaware began to purchase

preferred shares of the Holding Company and by March 8, 1944 had acquired 10,000 shares (A 45a).

On March 6, 1944, while Delaware was still purchasing shares, the court denied the Petition for Order No. 570, holding that only the New Haven's Trustees, as holders of a majority of the preferred stock, could bring about a liquidation of the Holding Company (A92a-A103a), which they could not be required to do (A95a, A103a). Delaware's purchase of the stock was thereafter ratified by its Executive Committee on March 10, 1944 (J 10a-13a).

With Petition for Order No. 570 out of the way, the court, on May 22, 1944, directed the filing of briefs not later than June 15, 1944 on Claim No. 82. The Court's order was received by Delaware's counsel and was a matter of consideration (Exs. R-5, R-6; J 4a-5a, 7a). However, no brief was filed by Delaware, a policy of inaction evidently having been decided upon.

That this is so is clear from the fact that Delaware, as we have said, neither appealed from the order of August 4, 1944 dismissing the claim with respect to the guaranty of par value nor made any attempt to obtain a modification of the order for almost nine years. Moreover, Delaware thereafter sedulously avoided informing the court as to its subsequent activities elsewhere.

In the following year, on January 12, 1945, a bill was introduced in the Massachusetts legislature for the dissolution of the Holding Company (J 3a). Delaware actively supported this legislation (A 54a). In 1946 the dissolution act was passed (A 118a). This act terminated and annulled the corporate existence of the Holding Company (A 118a, Sec. 1) and in effect fixed July 1, 1947 as the time for proceedings looking to the sale of its assets (A 118a, Sec. 3).

On the following day, July 2, 1947, Delaware and other preferred stockholders of the Holding Company, pursuant

to the dissolution act, filed a petition in a Massachusetts court for the receivership and liquidation of the Holding Company, which in turn filed an answer in opposition attacking the constitutionality of the legislation (A 54a).

On September 11, 1947, as we have said, the Consummation Order and Final Decree (A 125a) was entered after a hearing in the New Haven proceeding. At that time the amount of various unsecured claims entitled to participate in the plan had been determined by the court in one way or another, but there had been no disposition of the three groups of unsecured claims to which we have previously referred, and for which new common stock was required to be reserved under the plan. The general scheme of the order was to permit later distribution of the stock on the unsecured claims that had been fixed and to reserve enough to cover the claims that constituted unfinished business. This order was entered without intervention or opposition by Delaware (A 54a).

Delaware's continued abstention from the New Haven proceedings was and continued to be deliberate. A notice having been published on September 29, 1947 with respect to the treatment of securities, including Holding Company preferred stock, in the New Haven reorganization (R. 10, J 22a-23a), Delaware's general counsel raised the question with its Boston counsel as to whether any action should be taken (J 22a), the response by Boston counsel being that "in view of the small value attributable to (New Haven common) stock, I should hesitate before ever getting into a position where we shall have accepted something for the New Haven's breach of guaranty" (J 26a).

Thereafter, on May 24, 1948, in pursuance of the court's order of April 5, 1948 directing the initial distribution of common stock to the holders of unsecured claims thereto-

fore allowed, a notice was published (Ex. R-12, J 28a) providing, in the case of the Holding Company preferred stockholders, among other things, for the submission of their certificates for cancellation of the New Haven guaranty. A copy of this notice was transmitted by Delaware's general counsel to its Boston counsel on that date (Ex. R-12, J 27a) with the comment that it was their view "that we should do nothing at this time either", awaiting the final outcome of the liquidation proceedings. To this Boston counsel responded the following day (Ex. R-13, J 30a) that "we all seem to be in accord as to the importance of not seeking or accepting at this time any of the common stock of the New Haven Railroad."

Throughout this period the Massachusetts liquidation proceedings continued. Despite the New Haven's opposition, those proceedings, on October 4, 1948, were held constitutional (*Delaware and Hudson Co. et al.* v. *Boston Railroad Holding Co. et al.*, 323 Mass. 282, appeal dismissed March 28, 1949, 336 U. S. 932). Thereafter, on June 15, 1949, the Supreme Court of Massachusetts appointed a liquidating receiver.

On December 7, 1949 Delaware filed a petition in the Holding Company receivership in which it took the position that all of the publicly held preferred shares had priority over the New Haven shares. However, on November 9, 1951 the Supreme Court of Massachusetts decided that, because of the discharge of the guaranty through the New Haven Consummation Order and Final Decree, the publicly held preferred shares had no priority in liquidation (*Delaware and Hudson Co. et al.* v. *Boston Railroad Holding Co. et al.*, 328 Mass. 63, cert. den. 343 U. S. 920).

As a result of that holding, instead of Delaware receiving the par value of its stock as it had expected, there was distributed to all of the holders, including Delaware,

only $11.32 per share. Notice of this allowance was sent to preferred shareholders on March 6, 1953.

Thereupon, on May 11, 1953, Delaware, having been disillusioned by the result in Massachusetts, filed its petition in the New Haven proceedings (A 3a), seeking to reopen Claim No. 82 and to procure the allowance of a general claim, payable in common stock from the reserved shares, for the difference between what it received in the Massachusetts receivership and the par value of its shares.

The Intervening Rights of Others

The court's order of May 19, 1948, the Order Approving Procedure (A 146a-152a), provided for the certificates of interest. As to these, as we have pointed out, Judge Hincks said (A 61a):

> "This right of participation *vested* in unsecured creditors upon entry of the Final Decree and Consummation Order." (Italics supplied.)

Consequently, as Judge Hincks noted (A 63a), ever since the Final Decree and Order of Consummation the holders of certificates of interest, in their dealings, have been entitled to rely upon their right to participate in the distribution of the block of New Haven common stock, "the available amount of which was subject to reduction only by possible allowances of the three claims above described". And the court added:

> "And the record shows that throughout the period there have been active dealings in the Certificates."

To grant the petition of Delaware would seriously impair the vested rights of the certificate holders, and to grant all the relief sought would result in a reduction of about 7% in the common stock ultimately to be issued

from reserved shares to holders of certificates of interest (A 63a).

To take the case of this respondent, Connecticut Railway and Lighting Company, it received $4,589,318.87 face value of certificates of interest (cf. J 33a). The complete success of Delaware's petition would result in a loss to that respondent of 3,420 shares of new New Haven stock, if, as seems likely (A 62a), no stock is to be issued to the Boston and Providence interests. The loss to Connecticut Railway and Lighting Company would also be substantial, though less than the above, if only Delaware and a few other preferred stockholders in like situation were to get the relief Delaware asks. As Judge Clark pointed out (App. p. 22):

> "To allow Delaware any satisfaction of its claim would impair the rights of Certificate Holders by a like amount. There have been active dealings in the Certificates since their issuance. We agree with Judge Hincks that the intervention of vested rights furnishes an additional reason for refusing to reopen the proceedings."

ARGUMENT

A

As we have stated, Delaware's petition in this Court is based exclusively upon its assertion that where a claim is disallowed, denied and dismissed under Section 57(d) of the Bankruptcy Act, it is by definition unliquidated and of uncertain value.

We can find no previously reported instance of such a contention, and as Judge Clark said in his opinion for the Court of Appeals (App., p. 21):

> "We find it difficult to conceive of reasonable reliance on the preservation of a claim as 'unliquidated' when that claim has been 'wholly . . . denied and dismissed'."

Delaware argues (petition, pp. 9-10) that it never has been suggested in ordinary bankruptcy proceedings, and therefore should not be suggested in a proceeding under Section 77 of the Bankruptcy Act, that a disallowance under Section 57(d) amounted to a liquidation at zero. We know of no authority holding that the determination of a claim may not be at zero, and that is precisely what Judge Hincks intended to do in the instant case.

Section J(17) of the Plan provided (A 6a-7a):

> "The public holders of 24,150 preferred shares of the Boston Railroad Holding Company shall, *to the extent finally allowed by the Court* for any breach of the contract of guaranty, both for par value and dividends, be included among the holders of unsecured obligations and claims." (Italics added.)

Section K of the Plan, in so far as here pertinent, provided (A 7a):

> "No payment shall be made by the reorganized company upon, or on account of, such guaranty of the preferred stock of the Boston Railroad Holding Company, except as provided in clause (17) of section J hereof . . ."

The Plan was approved by the reorganization court on March 6, 1944 (A 48a). Promptly thereafter the court proceeded to consider Claim No. 82, for the purpose of establishing the basis for its participation under the Plan. On August 4, 1944 the claim was adjudicated (Order No. 763, A 80a) with a denial with respect to the guaranty of par value (A 76a).

Therefore, what Judge Hincks did was to remove Claim No. 82 from the category of unliquidated claims, holding as to the guaranty of par value that no loss had been proved. Judge Hincks explained the effect of his decision when he stated (A 48a):

> "Thus any provisions of the Plan which seemed to place the claim of owners of the publicly-held preferred stock of the Holding Company in the category of the unliquidated claims *were speaking prospectively as of February, 1944.* Claim 82 was definitely and finally removed from that category by Order 763 (August 4, 1944) whereby that claim, except for the allowance of $32 per share on account of the dividend guarantee was unequivocally 'wholly disallowed, denied and dismissed.' In the face of the language in that Order and in the light of the memorandum which preceded it it is wholly untenable to urge now that the claim on account of a possible breach of the par value guarantee was never adjudicated." (Italics added.)

Any construction of a plan of reorganization by the district judge who is familiar with every phase of it is necessarily entitled to great weight. This is particularly true where, as here, that judge has previously dealt in some detail with the very provisions here in question (*Commission of Department of P. U.* v. *N. Y. N. H. & H. R. Co.*, 178 F. 2d 559, 563, 2 Cir., 1949, cert. den. 339 U. S. 943). To the same effect see Judge Clark's opinion (App. p. 19).

B

As we have said, Delaware presents as its sole basis for certiorari the contention that, where a claim is disallowed, denied and dismissed under Section 57(d), it

is by definition unliquidated and of uncertain value (petition, p. 8). However, despite Delaware's express limitation of the question presented, it contends further that in order for a plan to satisfy the requirement that it be fair and equitable (Section 77(e)), provision should be made "to pay to holders of such claims, if they become absolute, the value of the securities that would have been allotted to them had the claims been absolute at the time of reorganization" (petition, p. 9). This belated suggestion that the plan was not fair and equitable comes twelve years after the plan was approved on March 6, 1944. At that time Delaware was already a holder of preferred stock of the Holding Company, but did not see fit to appeal from the order of approval and in fact, as we have seen, sedulously avoided any participation in the New Haven reorganization.

So it was that Judge Clark said in the opinion of the Court of Appeals (App. pp. 21-22):

> "Although in general a plan may not destroy a contingent claim without providing for it in some manner—see *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 2 Cir., 161 F. 2d 413, 428, certiorari denied *Institutional Group for Boston Terminal Bonds* v. *New York, N. H. & H. R. Co.*, 331 U. S. 859—we conclude that here, where a claimant has deliberately refrained from disclosing to the court before consummation the possibility of liquidation by legislation, it cannot now be heard to assert that the Plan must be interpreted to provide for its 'unliquidated' claim."

C

Even if we were to indulge in the assumption, *arguendo*, that Delaware's position was otherwise sound, its contentions are not here available since the equities have run

against it. Both of the courts below recognized a power in the court to reopen a final decree in railroad reorganization proceedings, but both courts also recognized that such a power should not be exercised in this case (A 56a, App. p. 20). Judge Clark summed it up when he said (App. 20):

> "In this case the equities are so strongly adverse to Delaware that the district judge clearly abused no discretion vested in him when he refused to act."

Delaware here says (petition, p. 8):

> "Petitioner believes that the Courts below incorrectly balanced the equities in this matter, but it recognizes that such issue may not be one of sufficient general importance to warrant this Court's consideration. Therefore, petitioner at this time restricts its prayer for review to the narrow issue of law presented. Thus petitioner submits that it was entitled *as a matter of law* to the relief requested by its petition to the Bankruptcy Court."

Delaware's abstention from any activity with respect to the order was due to its deliberate decision not to participate in the New Haven proceedings. This decision in turn was motivated by its plan to foment legislation in Massachusetts dissolving the Holding Company.

This program was at no time disclosed to the District Court, either by way of information or by seeking a reopening of Order No. 763, until, to use Judge Hincks' phrase, that order had "become hardened into the finality of a Final Decree" (A 56a), and indeed until some six additional years thereafter.

It was only when Delaware had been disappointed and disillusioned by the result of the Massachusetts statutory

liquidation that it sought on May 11, 1953 to modify the then ancient Order No. 763, and this at a time when, as we have shown, intervening rights had long since vested.

These intervening rights were those of the holders of certificates of interest which had vested on the basis of the Final Decree. As we have pointed out (p. 12, *supra*), to grant Delaware's petition would seriously impair these vested rights. Moreover, there have been active dealings in the certificates since their issuance.

It must be assumed, as did the courts below, that these certificates have been traded in with reliance upon the orders of the reorganization court, and without knowledge of Delaware's undisclosed intentions. To grant Delaware's petition would therefore inevitably prejudice the rights of various third parties, and in such a situation the courts have consistently held that a final decree will not be reopened. *Standard Steel Works* v. *American Pipe and Steel Corporation*, 111 F. 2d 1000, 9 Cir., 1940; *North American Car Corporation* v. *Peerless W. & V. Machine Corporation*, 143 F. 2d 938, 2 Cir., 1944; *Duebler* v. *Sherneth Corporation*, 160 F. 2d 472, 2 Cir., 1947; *Mohonk Realty Corporation* v. *Wise Shoe Stores, Inc.*, 111 F. 2d 287, 2 Cir., 1940, cert. den. 311 U. S. 654; *Grand Union Equipment Co. v. Lippner*, 167 F. 2d 958, 2 Cir., 1948.

If Delaware ever had "a legal right", as it here contends, such "legal right" manifestly was long ago rendered unenforceable by the entry of the Final Decree and by the adverse equities which both courts below found existed, findings which are not here sought to be reviewed.

Summary

Delaware seeks certiorari upon the assertion that under Section 57(d) of the Bankruptcy Act it is entitled as a matter of law to the relief requested by its petition to the

Bankruptcy Court. Delaware moreover advances the additional contention that the Plan was not fair or equitable, having made no provision to pay to the public holders of the Holding Company preferred stock "the value of the securities that would have been allotted to them had the claims been absolute at the time of reorganization."

Whatever may have been the "legal" position of Delaware years ago when the court was considering the Plan and Claim No. 82, Delaware's deliberate abstention from participation in the reorganization proceedings, while it gambled upon the results of legislative dissolution in Massachusetts, and while it permitted the intervening rights of others to vest, necessarily eliminated any "legal right".

Therefore, the "narrow legal question" which Delaware presents to this Court in reality does not exist at all and there is nothing for its consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y., February 23, 1956.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 620

THE DELAWARE AND HUDSON COMPANY, *Petitioner*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and CONNECTICUT RAILWAY AND LIGHTING COMPANY, *Respondents*

REPLY BRIEF OF THE DELAWARE AND HUDSON COMPANY TO BRIEFS OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND CONNECTICUT RAILWAY AND LIGHTING COMPANY

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REPLY BRIEF OF THE DELAWARE AND HUDSON HAVEN AND HARTFORD RAILROAD COMPANY AND CONNECTICUT RAILWAY AND LIGHTING COMPANY

Let us remember these undisputed facts. The Principal Debtor (The New York, New Haven & Hartford Railroad Company) guaranteed payment of the par value of shares of the preferred stock of The Boston Railroad Holding Company. The petitioner, The Delaware and Hudson Company, has a large investment in these shares. The Principal Debtor guaranteed such payment upon liquidation of the Holding Company or upon a statutory liquidation sale of its assets. Since the Principal Debtor was the chief owner of the shares of the Holding Company, it alone was held by the Bankruptcy Court to be in a position to move for such liquidation or sale. It never did so. The Interstate Commerce Commission directed repudiation of the guarantee

by the Principal Debtor, but reserved to stockholders the privilege of proving a claim for damages for the breach. After Delaware had made an unsuccessful effort in the reorganization proceedings to have its claim for damages allowed, it pursued the natural remedy of obtaining by legislative act a liquidation in Massachusetts. This at length satisfied the technical requirement for establishing breach of the guarantee contract. However, it took many years of litigation to do this because of the determined opposition of the Principal Debtor.

Pages 75a and 76a of Delaware's Appendix to Brief contain the pertinent portion of the Memorandum of Decision of the Bankruptcy Court concerning Claim 82 (Delaware's original petition for allowance of the claim in bankruptcy). They show the true reason for disallowance. This passage coupled with the provisions of Section 57d. of the Bankruptcy Act and Section J(17) of the Plan of Reorganization (p. 6 of our Petition for Certiorari) constitute what we claim to be a sufficient reply to the two briefs in opposition.

Petitioner persists in its claim of a *legal right* to participate in the fund reserved for claims not previously liquidated.

Respectfully submitted,

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Dated: February 28, 1956.